LEGAL REVIEW NOTE

LC#: LC1449, To Legal Review Copy, as of January 9, 2013

Short Title: Revise jury instruction laws

Attorney Reviewers: Helen Thigpen/Todd Everts

Date: January 13, 2013

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC 1449 requires a court in any criminal proceeding to "permit the defense to inform the jury that it has the right to judge the facts and the application of the law in relation to the facts in controversy." If passed, the act would be known as the "Larry Dodge Fully Informed Jury Act". To the extent LC 1449 allows a jury to determine the law of a case or disregard the law as instructed by the judge, the proposed legislation, as drafted, may raise potential constitutional issues under Montana law.

Under Montana law, a jury is limited to deciding questions of fact as opposed to questions of law. Article II, section 7, of the Montana Constitution provides that a jury may determine the law and facts of a case in suits and prosecutions for libel or slander. The Montana Constitution does not provide a similar right to juries acting in other cases.

A similar limitation is reflected in the Montana Code Annotated. For example, section 26-1- 201, MCA, provides that "Except as provided in Article II, section 7, of the Montana Constitution, all questions of law . . . must be decided by the court." In addition, section 46-16-103, MCA, provides that in criminal proceedings, "Questions of law must be decided by the court and questions of fact by the jury, except that on a trial for criminal defamation, the jury shall determine both questions of law and of fact." The only exception in addition to the exception

provided in Article II, section 7, is when a trial by jury is waived under section 46-16-110(3), MCA.

The transcripts from the Montana Constitutional Convention of 1973 indicate that the delegates sought an exemption for libel and slander suits. In debating Article II, section 7, Delegate DaHood stated, "I think to the trained legal mind, at first blush, it seems inconceivable that a jury shall have the right to determine the law. But apparently in the common law days of England, the right of free speech was considered so precious that the right, with respect to whether or not the law should apply in a particular case, was left to the jury rather than to the court so that there would be no abuse of that sacred right. That particular right apparently was carried over from England to the United States, and the framers of the current Montana Constitution and Bill of Rights carried that protection into the section on free speech." Constitutional Convention Proceedings, Vol. V, p. 1650.

Requester Comments: None

PERMIT THE DEFENSE TO INFORM THE JURY THAT IT MAY JUDGE THE FACTS AND THE APPLICATION OF THE LAW IN RELATION TO THE FACTS IN CONTROVERSY

The Attorney Reviewers state:

"To the extent LC 1449 allows a jury to determine the law of a case or disregard the law as instructed by the judge, the proposed legislation, as drafted, may raise potential constitutional issues under Montana law."

What the reviewers are missing, or misconstruing, is that LC 1449 does not allow the jury to determine the law. While it may be fine, there is a dividing line between "determin[ing] the law of a case or disregard[ing] the law as instructed by the judge", and "judging the facts and the application of the law in relation to those facts."

Let us start by agreeing we have the right to a jury trial. The right to trial by a jury of one's peers has been part of the Anglo-American concept of justice since the Magna Carta was signed in the year 1215. Chapter 39 of the Great Charter provides: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."

According to the Montana Constitution, Article II, Section 26. "The right of trial by jury is secured to all and shall remain inviolate." And, from the founding of our country to the present day, the jury has been given the responsibility to decide how the law applies to the facts.

If one goes before a jury for speeding or murder, the jury does not just judge the facts; instead they judge the application of the facts to the law. The jury, rather than find that you went 82 miles per hour or placed 2 shots into the deceased, will find you guilty, or not guilty, of the charges.

One historical case addressing this is *State v. Koch*, 33 Mont. 490, 85 P.272. This case involved a crooked card game on February 15, 1904 where Joseph Vander, the owner
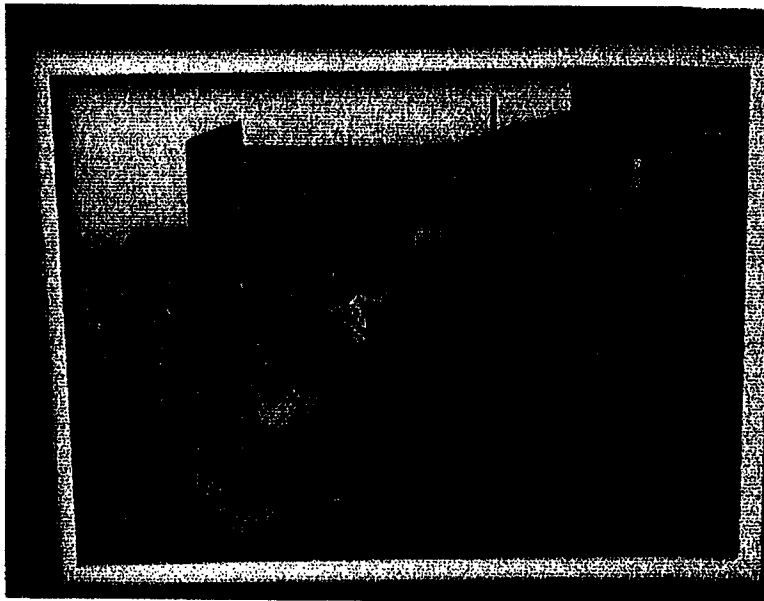
of a bar at Old Stanford, MT, and a couple of his shills, plied Koch with free whiskey and then cheated this unemployed sheepherder out of $20.00 of gold coin. These funds were likely a large part of Koch's funds for surviving the rest of the winter.

Koch went to his hotel room, probably at the Hoffman Hotel pictured in Charles M. Russell's painting, *In Without Knocking*. There he got his rifle, returned to the bar and shot through the door of a back room where the crooks had fled, killing Vander. At the trial, the judge instructed the jurors:

> Under the charge contained in this information you may find the defendant guilty of murder in the first degree, murder in the second degree, or you may find him guilty of voluntary manslaughter or of involuntary manslaughter, but you cannot find him not guilty.

Koch was tried and the jury found him guilty of voluntary manslaughter and sentenced him to a sentence of 10 years. Koch appealed on the ground the judge had taken away his right to be tried by the jury.

In 1906 the Montana Constitution stated under Article III, section 16:

> In all criminal prosecutions the accused shall **have the right to *** a speedy public trial by an impartial jury** of the county or district in which the offense is alleged to have been committed, ***.

Today our right to have the jury try us is expressed exactly the same under Article II, section 24 of our 1972 Constitution. The wording in both our old and our new constitutions are virtually the same as the Sixth Amendment of the U.S. Constitution, which states:

> In all criminal prosecutions, **the accused shall enjoy the right to a speedy and public trial, by an impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Based upon this right of the accused to have trial by the jury, and not by the judge, the court in *Koch*, stated:

> The guaranty contained in this provision is general in its terms and of universal application, including misdemeanors as well as felonies, and unless there is some exception by express provision found elsewhere, or

some principle of construction by which an exception may be made, it must be construed to mean exactly what it says, and it must follow that the question of guilt or innocence of the defendant must be submitted to, and determined by, the jury, however clear and unimpeached or free from suspicion the evidence may be. There is no exception expressly provided for anywhere in the Constitution, such as that in clear cases wherein the facts are admitted or undisputed, the court may direct a verdict of guilty.

After the Montana Supreme Court reversed his sentence, Koch was retried, convicted by a new jury of involuntary manslaughter, and sentenced to 8 years to be served in the prison at Deer Lodge.

This concept of being tried by a jury, rather than by the judge, in 2000 was reaffirmed by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466. The trial court sentenced Apprendi under a statute described as a "hate crime" law that provided for an "extended term" of imprisonment if the trial judge found by a preponderance of the evidence that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

The trial judge enhanced the sentence by at least 10 years in prison and Apprendi appealed. The Supreme Court found for Apprendi, stating:

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt.6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

When the jury determines whether the accused is guilty or innocent of an element of a crime, it is determining the application of the facts to the law. It was the jury's responsibility to judge the application of the facts to the law in *Koch* and in *Apprendi*, and it continues to be so today.

Thank you,
Jerry O'Neil, Representing HD-3